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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re LEILA W. et al, Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

BRAD W. et al,

Defendants and Appellants.

D055270

(Super. Ct. No. NJ14097)

APPEALS from orders of the Superior Court of San Diego County, Michael Imhoff, Judge. Affirmed with directions.

Brad W. and Melanie W. (together the parents) appeal jurisdictional and dispositional orders regarding their children, Leila W. and Kai W. The parents contend substantial evidence does not support the jurisdictional and dispositional findings and orders. Melanie also asserts the court reversibly erred by holding the jurisdictional and dispositional hearings prematurely under Indian Child Welfare Act (ICWA)

requirements, and the Agency did not provide proper ICWA notice. We affirm the jurisdictional and dispositional orders, but remand the case for the limited purpose of ensuring compliance with ICWA requirements.

FACTUAL AND PROCEDURAL BACKGROUND

On March 26, 2009, the San Diego County Health and Human Services Agency (the Agency) petitioned on behalf of 10-year-old Leila and eight-year-old Kai, under Welfare and Institutions Code¹ section 300, subdivision (b), alleging they were at substantial risk because marijuana and illegal drug paraphernalia were found in and around the family home in areas accessible to them.²

The social worker reported the parents were arrested when federal drug enforcement (DEA) agents found 500 to 600 marijuana plants growing in two outbuildings next to the home where the family lived on property they shared with the paternal grandparents. Agents also found three large bags of marijuana in a freezer, a container of marijuana in a refrigerator, marijuana and drug paraphernalia in the parents' bedroom, three unloaded guns, and \$10,000 to \$20,000 in cash. The DEA agents said Brad had a medical marijuana card, but they believed the marijuana was being grown for

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

² The petitions initially included allegations under section 300, subdivision (g), that the children were left without provision for support. These allegations were subsequently dismissed.

sale because of the large quantity involved. The paternal grandmother said Brad and the paternal grandfather grew the marijuana, and they and she used it occasionally.

Leila said the family had been living on the property for about six months. She told the social worker the parents used the marijuana for medical reasons. She said she had been inside one of the outbuildings, but she did not know what was in there. She said the parents smoked marijuana only when she and Kai were at school or had gone to bed. When Kai was questioned, he answered "I don't know" to most questions. Initially, Leila tested presumptively positive for marijuana, but her second test was negative. The court ordered the children detained.

Melanie indicated she has Indian heritage with the Pala band through the maternal great-grandmother. She said she believed the maternal great-grandmother was "full Indian" and born at Pala. On the ICWA form she stated her Indian heritage was through the Luiseno, Cupeno, Pala Band, Pauma Band of Luiseno Mission Indians and the Soboba Band.

The parents said the marijuana was for personal medical use and the children did not use the areas of the property where it was located. They said they would do whatever they needed to do to reunify with the children.

At the jurisdictional/dispositional hearing, Brad provided the court with a copy of a physician's statement and recommendation for marijuana use. The statement was dated April 19, 2008, and expired one year from that date. After considering this evidence, other documentary evidence and argument by counsel, the court found the allegations of the petitions true. It found the number of marijuana plants being grown on the property

was excessive for Brad's personal medical use, and the marijuana was accessible to the children. After further argument and discussion, the court ordered the children removed from the parents, placed them with relatives and authorized expanded visits. The court continued the ICWA matter to a future date.

DISCUSSION

I

The parents contend the court erred by finding the allegations of the petitions to be true. They claim there was no evidence the children were at a substantial risk of harm.

A reviewing court must uphold a juvenile court's findings and orders if they are supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1036-1037.) Determinations of credibility of witnesses and resolutions of conflicts in the evidence are for the trier of fact. (*In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1226-1227.) "[W]e must indulge in all reasonable inferences to support the findings of the juvenile court [citation], and we must also ' . . . view the record in the light most favorable to the orders of the juvenile court.' [Citation.]" (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114.) The appellant bears the burden to show the evidence is insufficient to support the court's findings. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

The focus of the dependency statutes is to prevent harm to the child. (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.) "The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2.)

Substantial evidence supports the court's finding of jurisdiction. The petitions alleged the children were at risk because of marijuana and illegal drug paraphernalia in the family home and surrounding structures in areas that were accessible to them. Hundreds of marijuana plants were found growing in two outbuildings. There also was marijuana in the parents' bedroom, a refrigerator and a freezer. Leila was aware of the parents' marijuana use and said she had gone in one of the outbuildings, although she said she did not know what was in them. The court's finding the children were at substantial risk is well supported.

II

The parents also assert the court erred by ordering the children removed from parental custody. They argue there was no showing they were at substantial risk at the time of the hearing, and there were ways to protect them short of removal.

Section 361, subdivision (c)(1) provides a child may not be taken from the custody of his or her parents unless the juvenile court finds by clear and convincing evidence:

"There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody."

"The juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion." (*In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103-1104.) Services must be designed to remedy the problems that led to the loss of custody. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1007.)

The parents have not shown error. Although Brad said the marijuana plants and marijuana had been removed and he had cleaned the home, the parents had exposed the children to substantial risk from the marijuana and drug paraphernalia and they were just beginning to work with their service providers. Brad had insisted he had a license to grow and distribute marijuana and his motives were altruistic, but his therapist reported after two months of treatment, Brad was becoming more accountable and insightful. Melanie's treatment case manager reported Melanie had shown a positive attitude and she was working hard in her program. The dispositional orders are well supported.

III

Melanie asserts the court erred by making the jurisdictional and dispositional findings and orders less than 10 days after notice was received by relevant Indian bands in violation of ICWA requirements and before making a finding on whether the ICWA applied in the case. She also maintains the Agency did not provide notice to four federally recognized Luiseno bands.

Congress enacted the ICWA in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902.) "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) Section 1911 of the ICWA provides that a tribe may intervene in state court dependency proceedings. (25 U.S.C. § 1911(c).) Notice to the tribe provides it the opportunity to exercise its right to intervene. (*In re Junious M.* (1983) 144 Cal.App.3d

786, 790-791.) The ICWA provides "where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings, and their right of intervention." (25 U.S.C. § 1912(a); see also § 224.2; Cal. Rules of Court, rule 5.481 (b).)

Here, although it appears ICWA notice was not provided to all of the relevant Indian bands and the court held the jurisdictional and dispositional hearings prematurely and before it had determined whether ICWA applied, we decline to reverse the jurisdictional and dispositional orders. There is not a sufficient showing the children are Indian children within the meaning of ICWA. (Cf. *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431.) If after proper inquiry and notice a tribe determines the children are Indian children, the parents or the children may petition the court to invalidate an action of placement out of parental custody or termination of parental rights "upon a showing that such action violated any provision of sections [1911, 1912, and 1913]." (25 U.S.C. § 1914.)

DISPOSITION

The jurisdictional and dispositional orders are affirmed. The matter is remanded to the juvenile court with directions to instruct the Agency to complete ICWA notice and for the court to make a finding whether ICWA applies in this case. The court shall advise the parents that if the children are determined to be Indian children within the meaning of ICWA, they have the right to petition the court to invalidate any action in violation of 25 United States Code, sections 1911, 1912 and 1913. (25 U.S.C. § 1914.)

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.